

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 GDCM TRUST,

5 Movant,

6 v.

7 UNITED STATES COMMODITY FUTURES
8 TRADING COMMISSION,

9 Respondent.

Case No. 2:15-cv-02153-APG-PAL

**ORDER OVERRULING IN PART AND
SUSTAINING IN PART OBJECTIONS
TO MAGISTRATE JUDGE'S ORDER**

(ECF No. 12)

10 Movant GDCM Trust, through its trustee Joel Pecker, seeks to quash subpoenas sent to
11 Bank of America, N.A. and Citibank, N.A. seeking information about GDCM Trust's accounts at
12 those institutions. After reviewing the Commodity Futures Trading Commission's ("CFTC") *in*
13 *camera* opposition and exhibits, Magistrate Judge Leen denied the motion to quash. GDCM
14 Trust objects to her ruling.

15 I overrule GDCM Trust's objections with regard to the subpoena sent to Bank of America
16 because the CFTC has demonstrated it is engaged in a legitimate law enforcement inquiry, that
17 the records sought are relevant to that inquiry, and that it complied with the Right to Financial
18 Privacy Act ("RFPA") with respect to that subpoena. However, I sustain the objections with
19 regard to the subpoena sent to Citibank because the CFTC has not presented any evidence that it
20 advised Joel Pecker that it sought to obtain his personal account information, as opposed to
21 GDCM Trust's account information. The CFTC therefore has not shown that it complied with
22 the RFPA with respect to account information in Joel Pecker's name at Citibank.

23 On October 28, 2015, CFTC sent administrative subpoenas to Bank of America and
24 Citibank captioned "In re: Certain Persons Engaged in Fraud With Respect to Pooled Investments
25 And/Or Managed Accounts." ECF No. 1 at 6-25. The subpoenas requested documents for
26 "accounts titled in the name of or for the benefit of GDCM Trust." *Id.* at 13, 23. The cover letters
27 advised Bank of America and Citibank that if "any account held by GDCM Trust is a jointly-held
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1 account with an individual,” to advise the CFTC so it could comply with the RFPAs as to that
2 individual account holder. *Id.* at 6-7, 16-17 (emphasis omitted). The CFTC mailed the required
3 RFPAs notice of these two subpoenas to GDCM Trust. ECF No. 14-1 at 2-3. That letter stated
4 that the CFTC entered an order of investigation authorizing subpoenas to investigate possible
5 violations of Section 4b of the Commodity Exchange Act, and it identified the statutory authority
6 for the investigation, specifically Sections 6(c) and 8(a) of the Act. *Id.* GDCM Trust’s attorney
7 contacted the CFTC and was read the CFTC’s order authorizing the issuance of the subpoenas;
8 that order also referenced an investigation pursuant to Sections 6(c) and 8(a)(i) of the Commodity
9 Exchange Act. *Id.* at 29.

10 GDCM Trust moved to quash the subpoenas. ECF No. 1. The CFTC responded with an
11 *in camera* submission, with a redacted version filed on the court’s public record. ECF No. 9. The
12 publicly recorded version did not reveal that the CFTC had issued a second subpoena to Citibank
13 seeking Joel Pecker’s account information, as opposed to GDCM Trust’s account information.¹
14 *Id.* Joel Pecker thus had no knowledge of, or reason to object to, this second subpoena before
15 Magistrate Judge Leen.

16 After reviewing the CFTC’s *in camera* submission, Magistrate Judge Leen denied the
17 motion to quash. ECF No. 11. GDCM Trust objects to that ruling, arguing that the CFTC has not
18 shown that it was engaged in a legitimate law enforcement inquiry, that the requested records are
19 relevant to that inquiry, or that the CFTC complied with the RFPAs’s requirements.

20 In response to that objection, the CFTC publicly revealed that on November 9, 2015, the
21 CFTC “issued a new subpoena to Citibank for Joel Pecker’s bank account records, and sent notice
22 of the subpoena to Joel Pecker.” ECF No. 14 at 2. However, the CFTC has presented no evidence
23 that it actually sent the November 9, 2015 subpoena with RFPAs notice to Joel Pecker.

27 ¹ It is unclear why the CFTC redacted that information if it is the CFTC’s position that Joel Pecker
28 was mailed a copy of the November 9, 2015 subpoena and RFPAs notice.

1 In reply, Joel Pecker states that the CFTC's opposition was the first notice he had that
2 CFTC had issued a subpoena for his personal records. ECF No. 15 at 2. His counsel inquired
3 about the subpoena, but to date has received no response from the CFTC. *Id.* at 2, 8-10.

4 Under the RFPA, government agencies like the CFTC can administratively subpoena
5 customer records from a financial institution if (1) there is reason to believe the records are
6 relevant (2) to a legitimate law enforcement inquiry and (3) the CFTC complies with the statutory
7 requirements which include serving or mailing a copy of the subpoena to the customer along with
8 a notice that states "with reasonable specificity the nature of the law enforcement inquiry." 12
9 U.S.C. § 3405; *see also Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d. Cir. 2007), *as amended*
10 (March 7, 2007). A customer may move to quash a subpoena on the grounds that the "financial
11 records sought are not relevant to the legitimate law enforcement inquiry stated by the
12 Government authority in its notice, or that there has not been substantial compliance with the
13 provisions of this chapter." 12 U.S.C. § 3410(a). The CFTC can supplement its response to a
14 customer's challenge to the subpoena with an *in camera* submission to the court. *Id.* § 3410(b).

15 Here, the notice sent to GDCM Trust identified the nature of the inquiry; the RFPA notice
16 referenced the statutory sections for which possible violations were being investigated and the
17 authority for that investigation; and the CFTC read to GDCM Trust's counsel the order which
18 identified the relevant statutory sections authorizing the investigation. Additionally, considering
19 the *in camera* submission, the CFTC has demonstrated it is engaged in a legitimate law
20 enforcement inquiry and that the records sought are relevant to that inquiry. The only question is
21 whether the CFTC complied with the statutory requirements.

22 The CFTC has done so with respect to the subpoena sent to Bank of America for GDCM
23 Trust's account information. The CFTC presented evidence that it mailed a copy of the subpoena
24 and the required RFPA notice to GDCM Trust. GDCM Trust undoubtedly received it because it
25 attached the subpoena to its motion to quash. I therefore overrule GDCM Trust's objections and
26 accept Magistrate Judge Leen's recommendation to deny the motion to quash with respect to the
27 Bank of America subpoena.
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1 However, the CFTC has not shown it complied with the statute with respect to the
2 subpoena sent to Citibank. The CFTC contends that in response to its October 28, 2015
3 subpoena, Citibank requested additional information. CFTC's *In Camera* Submission at 5. The
4 CFTC provided account information and Citibank responded that the account was not in GDCM
5 Trust's name, it was in Joel Pecker's. *Id.* The CFTC contends that in response to this
6 information, it told Citibank not to send any documents without further notice, and it then sent a
7 second subpoena to Citibank on November 9, 2015 for accounts in Joel Pecker's name. *Id.* The
8 CFTC asserts that it sent notice of this second subpoena to Joel Pecker. *Id.*

9 However, the CFTC has not provided any evidence that it served Joel Pecker with the
10 subpoena and RFPA notice or that it mailed the documents to him at his last known address. It
11 does not provide a copy of the subpoena and notice nor does it identify to what address the
12 documents were sent. Joel Pecker contends the CFTC's opposition was the first notice he had of
13 such a subpoena, and the CFTC has not presented any evidence to the contrary.²

14 I therefore modify in part Magistrate Judge Leen's ruling that denied the motion to quash
15 the Citibank subpoena. Because the CFTC did not publicly reveal the information about the
16 second subpoena until after Magistrate Judge Leen ruled, she did not have the benefit of Joel
17 Pecker's response indicating he never received an RFPA notice in relation to the November 9,
18 2015 subpoena. By the CFTC's own submission, the account at Citibank is not in GDCM Trust's
19 name so the October 28, 2015 subpoena seeking information on GDCM Trust's account does not
20 satisfy the RFPA as to Joel Pecker's individual account information. Further, the CFTC has
21 presented no evidence that it complied with the RFPA with respect to the November 9, 2015
22 subpoena for Joel Pecker's account information. Accordingly, both the October 28, 2015 and
23 November 9, 2015 subpoenas to Citibank are quashed.

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26 ² Because I deny GDCM Trust's objections to the Bank of America subpoena, and because the
27 CFTC's second Citibank subpoena seeks Joel Pecker's account information, I need not address the
28 CFTC's argument that GDCM Trust lacks standing as a "customer" under the RFPA to object to the
subpoenas.

1 IT IS THEREFORE ORDERED that GDCM Trust's objections (**ECF No. 12**) are
2 **overruled in part and sustained in part**. Magistrate Judge Leen's ruling (**ECF No. 11**) is
3 **accepted in part and modified in part**. GDCM Trust's motion to quash (**ECF No. 1**) is
4 **DENIED** as to the October 28, 2015 subpoena to Bank of America, N.A. but the motion is
5 **GRANTED** as to the October 28 and November 9, 2015 subpoenas to Citibank, N.A. The two
6 Citibank subpoenas are **QUASHED**.

7 IT IS FURTHER ORDERED that the clerk of court shall close this case.

8 DATED this 19th day of May, 2016.

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12 ANDREW P. GORDON
13 UNITED STATES DISTRICT JUDGE
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